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Supreme Court, U. S.
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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 75-1892

UNITED STATES OF AMERICA,
*Petitioner,*

vs.

JEFFREY R. MACDONALD,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION FOR JEFFREY R. MACDONALD

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION FOR JEFFREY R. MACDONALD

The respondent, Dr. Jeffrey R. MacDonald, respectfully prays that this Court deny the Petition of the United States for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The opinion of the court of appeals (Pet.App. B)[1] is reported at 531 F.2d 196. The order of the court of

[1] "Pet. App." refers to the separately-bound appendix to the government's petition.

appeals (Pet. App. A) denying the government's petition for rehearing, with a suggestion for rehearing *en banc,* is unreported. The opinion and order of the district court denying respondent's motions to dismiss the indictment (Pet. App. D) are unreported.

---

## JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976. A timely petition for rehearing, with a suggestion for rehearing *en banc,* was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for the government for filing a petition for a writ of certiorari to and including June 29, 1976. On July 29, 1976, the Clerk of the Court extended the time for the respondent to file an answer to the petition for a writ of certiorari to and including August 18, 1976. On August 16, 1976, the Clerk of the Court further extended the time for filing an answer to and including August 20, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

---

## QUESTIONS PRESENTED

1. Whether respondent was deprived of his Sixth Amendment right to a speedy trial.

2. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.



## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

28 U.S.C. §1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

---

## COUNTER-STATEMENT

1. In February, 1970, Jeffrey R. MacDonald, a medical doctor, was serving in the United States Army, attached to the Sixth Special Forces Group, at Fort Bragg, North Carolina. He resided with his family on the base.

In the early morning hours of February 17, 1970, Dr. MacDonald's wife, Colette, and his two daughters, Kristen (age 3) and Kimberly (age 6) were murdered, and Dr. MacDonald was stabbed in various parts of his body including his right lung, causing a near-fatal wound. The murders and assault were committed by the use of several knives, an ice pick and wooden clubs.

Dr. MacDonald reported to the authorities that the crimes had been committed by a number of persons, including a woman. The description of the woman furnished matched that of a person seen near the MacDonald household by a military policeman who was responding to Dr. MacDonald's telephone call for help.

The Federal Bureau of Investigation joined the Criminal Investigation Division of the Army (C.I.D.) in the early days of the investigation. However, the Army was given the responsibility of carrying out the investigation. On May 1, 1970, Army authorities arrested Dr. MacDonald and charged him with the murders of his family. He was placed in confinement under 24-hour armed guard and remained there throughout the subsequent military investigation and prosecution.

Proceedings against Dr. MacDonald were commenced under Article 32 of Uniform Code of Military Justice, 10 U.S.C. §832. The presiding officer was Colonel Warren V. Rock, an infantry colonel with thirty years of service and substantial court-martial experience. He had the full-time assistance of a qualified military judge, Captain Hammond Beale, as his legal advisor. Colonel Rock conducted the proceedings for a period of five months, from June through September of 1970. There were four full weeks of court testimony. And, an independent investigation was also undertaken by Colonel Rock.

Throughout the proceedings the government was represented by counsel who presented its case. Dr. MacDonald was present and represented by counsel at all times during the proceedings.

During the proceedings, Colonel Rock ordered the government to present all the evidence known to it. The evidence for the prosecution had been gathered as a result of months of effort by more than one hundred (100) military and civilian law enforcement investigators. These investigators had assembled evidence from



approximately 1,500 witnesses including persons in several foreign countries (A.673).

The home of Dr. MacDonald was taken over exclusively by military investigators and subjected to continuing examinations and searches. Large sections of walls and floors were taken as evidence. Blood stained clothing, wood and fiber samples were taken.

The hundreds of items of physical evidence that had been obtained by the government were subjected to intensive examination at the Criminal Investigation Laboratory of the Army, located at Fort Gordon, Georgia. Some evidence was also examined by other experts retained by the government. While some of this evidence was destroyed in C.I.D. laboratory testing, the remainder was the same physical evidence submitted to the Federal Bureau of Investigation laboratory in 1974. No new physical evidence was ever uncovered after the initial phases of the investigation in 1970.

The government called twenty-seven (27) witnesses against Dr. MacDonald during the military proceedings. Dr. MacDonald presented a full defense to the charges against him. He testified at length under oath and was subjected to an extensive and vigorous cross-examination by counsel for the government. He was also questioned extensively by the presiding officer. In addition to his own testimony, Dr. MacDonald called twenty-nine (29) witnesses on his behalf.

During the course of the Article 32 proceedings, Dr. MacDonald was subjected to two separate psychiatric examinations. One of these examinations was ar-

ranged by his counsel. The other examination was made by a team of three Army doctors at Walter Reed Hospital and was arranged by the presiding officer. In the words of Colonel Rock's final report, "there was a striking similarity in the conclusions" from these examinations (A.607). Those conclusions were that Dr. MacDonald was a sane, well-balanced adult and that "he was not hiding" any facts concerning the night of the murders of his family and the assault on him. In response to a question by the presiding officer as to whether Dr. MacDonald was "capable" of committing the gruesome killings of his wife and his children, a forensic psychiatrist advised the court that Dr. MacDonald was "not capable" of having committed these crimes (A.607).

On October 13, 1970, at the conclusion of military judicial proceedings under Article 32 of the Uniform Code of Military Justice, Colonel Rock, the presiding officer, submitted written conclusions and filed a ninety-page report and 2,000-page hearing transcript in support of his findings. His report concluded with two findings:

> (1) That the charges against Dr. MacDonald were "not true."
>
> (2) That the investigation of *another named individual, a woman,* be pursued as a suspect in the murders of the MacDonald family and the assault on Dr. MacDonald (A.603).[2]

[2]As noted in the government's petition, "A" refers to the appendix to respondent's brief in the court of appeals, a copy of which the government has lodged with the Clerk of this Court.



The findings of the presiding officer were subjected to two reviews by higher commanders. First, Major General Edward Flanagan made a full, independent examination of the findings and report of Colonel Rock. General Flanagan, who had originally convened the Article 32 proceedings, dismissed finally the charges against Dr. MacDonald.[3]

General Flanagan's decision to dismiss the charges was then subjected to an additional review by Lt. General John J. Tolson. He affirmed the dismissal of the charges.[4] On October 28, 1970, Dr. MacDonald was released from confinement.

On December 5, 1970, Dr. MacDonald was honorably discharged from the Army.

2. Approximately six months after his discharge from the Army, Dr. MacDonald moved to Los Angeles, California, where he is still living and is Director of Emergency Medicine at St. Mary's Medical Center, Long Beach, California.

From January, 1971 to 1972, the C.I.D. conducted an extensive re-investigation of the MacDonald family murders. The C.I.D. uncovered no substantial new evidence during this re-investigation (A.555).

The C.I.D. completed its re-investigation in December, 1971. It was not until approximately June, 1972 that the C.I.D. submitted the results of its re-investigation to the Justice Department and requested that the government seek an indictment against Dr. Mac-

[3]Brief for Appellee at 8, *United States v. MacDonald,* 531 F.2d 196 (4th Cir. 1976); Pet. App. B, 8a.

[4]*Id.*

Donald for the murders of his family. The Justice Department refused to pursue an indictment at that time (Pet. App. B, 9a).

From January, 1972 to July, 1974, Dr. MacDonald, in person and through counsel, requested the Justice Department to reach a final disposition of the MacDonald case (Pet. App. B, 9a, n.5; 10a, n.6). The Justice Department declined to act and asserted that it was conducting an "on-going" investigation of the case (Pet. App. B, 10a, n.6).

During that period the Justice Department conducted no significant investigation. The MacDonald case file was assigned and reassigned to a succession of staff attorneys who "reviewed and re-reviewed" the case (A.27). None of these attorneys took any definitive action on the case.

On January 10, 1974, Carl W. Belcher, Chief of the General Crimes Section, Criminal Division, Department of Justice, stated in writing and was quoted on January 10, 1974, as saying:

> . . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time.[5]

In July, 1974, Victor C. Woerheide, a Justice Department Attorney, was assigned the MacDonald case. He had no previous familiarity with the MacDonald case. In August, 1974, Woerheide began presenting

[5] *MacDonald v. United States* (4th Cir., No. 75-1621, decided July 1, 1975, *cert. denied*, 423 U.S. 926); Brief for Appellant at 55, n.35; *United States v. MacDonald, supra.*



evidence to a grand jury. Dr. MacDonald testified before the grand jury for six days.

From August, 1974 to January, 1975, the grand jury periodically heard testimony on the case. The grand jury proceedings were totally halted several times during those months so that Woerheide could take a five-week European vacation and later for him to attend to other personal matters.

On January 21, 1975, Dr. MacDonald testified for a second time before the grand jury. He was asked by a majority of the grand jurors to submit to a sodium amytol (the so-called "Truth Serum") interview. On January 23, 1975, Dr. MacDonald informed the grand jury that he was willing to undergo the sodium amytol procedure and that the results would be available to the grand jury in little more than one week. On January 24, 1975, the government's attorneys submitted a bill of indictment to the grand jury and Dr. MacDonald was indicted on the same day.

An indictment (No. 75-26-CR-3 of the Eastern District of North Carolina), charging Dr. MacDonald with three counts of murder in violation of 18 U.S.C. § 1111, was returned on January 24, 1975, more than four and one-half years after he had been initially arrested. Dr. MacDonald was arrested a second time at his home in Los Angeles, California, imprisoned, and held without bail until he was released on bond following a bail reduction hearing.

On April 8, 1975, he filed ten pretrial motions in the district court, all of which were subsequently heard and decided by Judge Franklin T. Dupree, Jr.

On May 30, 1975, Dr. MacDonald's motion for a change of venue to Los Angeles, California was denied by the district court.[6]

On July 28, 1975, the district court denied Dr. MacDonald's motion to dismiss the indictment because of discrimination in the selection of the grand jury (A.3).

On July 29, the district court also denied, in a single four-and-one-half-page order and opinion, seven other separately filed pretrial motions (Pet. App. D 44a). Dr. MacDonald appealed this decision to the court of appeals, which granted a stay of the trial and allowed the appeal (Pet. App. C, 42a). The appeal was allowed because the court of appeals found that "the contentions made are not frivolous and the rights asserted [both the speedy trial claim and the double jeopardy claim] are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost" (Pet. App. C, 42a-43a).

On January 23, 1976, the court of appeals reversed the district court and remanded with directions to dismiss the indictment on the ground that Dr. MacDonald had been denied his Sixth Amendment right to a speedy trial (Pet. App. B, 3a-27a).

3. The government has summarized in its petition, in part, the sequence of events in this case following

[6]The court of appeals dismissed respondent's appeal from this order, *MacDonald v. United States* (4th Cir., No. 75-1621, decided July 1, 1975, *cert. denied*, 423 U.S. 926). It also denied his petition for a writ of mandamus to compel the district court to grant the change of venue, *MacDonald v. United States* (4th Cir., No. 75-1681, decided July 15, 1975, *cert. denied*, 423 U.S. 927).



the indictment of the respondent. In its discussion of the dissent of Judge Craven in the court of appeals it makes clear that he substanially relied for part of his views on a conclusion that Dr. MacDonald was never arrested by the Army in 1970 (Pet. App. B, 38a). However, the government concedes its doubts about the efficacy of this conclusion later in its Petition for Certiorari. At pages 18-19, n.13, the government states it is willing to accept for the purposes of the petition, that Dr. MacDonald was arrested on May 1, 1970.

---

## REASONS IN OPPOSITION TO GRANTING THE WRIT

### 1. THE SPEEDY TRIAL ISSUE

a. It would be inappropriate for the Court to grant the government's request for certiorari on the speedy trial issue. In sustaining Dr. MacDonald's contention that he was denied his right to a speedy trial, the court of appeals relied upon the standards set down by this Court in *Barker v. Wingo,* 407 U.S. 514 (1972). The application of those criteria was both precise and accurate. And, they were applied to a case that concededly is unique and extraordinary on its facts.

The *Barker* test required the courts below to consider the length of the delay, the reasons for the delay, the assertions of the speedy trial right by the defendant and the prejudice to him. *Barker, supra,* at 530.

The length of the delay, nearly five years from the formal accusation of the defendant until indictment, was by any analysis an extreme one. Dr. MacDonald was arrested and charged with murder by the United States Army on May 1, 1970, and became the "accused" within the meaning of the Sixth Amendment and thus his speedy trial rights were triggered.[7] *United States v. Marion,* 404 U.S. 307 (1971). He was not indicted until January 24, 1975, more than four and one-half years later. As the Court explained in *Barker, supra,* at 530, the length of the delay is a "triggering mechanism," which determines whether it is necessary to consider the other three criteria. And, the Court in *Barker* considered a period of more than four years more than enough to require inquiry into the other criteria.

The second of the *Barker* criteria is the reason assigned by the government for the delay in the present case. This Court in *Barker, supra,* at 531, explained that:

> . . . different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence . . . should be considered since the ultimate responsibility for the circumstances must rest with the government rather than with the defendant. Finally,

[7]The Solicitor General concedes for the purpose of his petition the fact of Dr. MacDonald's arrest in May of 1970. Petitioner's Brief For Certiorari n.13, at 19.



> a valid reason, such as a missing witness, should serve to justify appropriate delay.

The respondent does not claim that the delay was a deliberate attempt to hamper his defense. And, the government has not suggested that its delay resulted because of a missing witness or related reason. Rather, it is in the middle ground of negligence and indifference to Dr. MacDonald's constitutional rights that the cause of the delay is to be found.

The Criminal Investigation Division of the Army, at the request of the Department of Justice, reinvestigated the MacDonald case. After a one-year investigation, the C.I.D. submitted a thirteen-volume report of its findings to the Department of Justice with a recommendation that an indictment be sought against the respondent (Pet. App. B, 9a).

However, the Department of Justice failed to act. Instead, the files were "assigned and reassigned" and "review(ed) and re-review(ed)" (A. 27).

In January 1974, the Chief of the General Crimes Section of the Criminal Division of the Department of Justice, Carl Belcher, was writing that there was insufficient evidence to bring Dr. MacDonald to trial (Pet. App. B, 10a, n.6). And, in response to a letter from Dr. MacDonald's counsel, in which the respondent was urging the final disposition of the case, Belcher answered with the investigator's catechism that "the matter is under investigation," and "that this case will remain under consideration *for the foreseeable future*" (Pet. App. B, 10a, n.6, emphasis supplied).

In fact, the MacDonald case was not under active investigation for most of the time it was in the Department of Justice. The court of appeals found that "no significant new investigation was undertaken during this period [of more than two years after the C.I.D. made its recommendation in June 1972], and none was pursued from August 1973 until the grand jury was convened a year later" (Pet. App. B, 21a).

And, the only significant result of the grand jury proceedings was to have the Federal Bureau of Investigation Crime Laboratory re-examine and reinterpret the evidence that had been in possession of the government for four and one-half years. The government was challenged on the issue of whether it had developed any new evidence that would account for the extraordinary delay in the case. The colloquy that took place between the United States Magistrate and counsel for the government at the bail reduction hearing in this case provided the answer:

> THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .
>
> ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: all that evidence has been produced *within the last five months* by the F.B.I. Lab.
>
> THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?
>
> ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence *was in existence the whole time:* the bloody sheet, the bath mat and the . . . .



> THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?
>
> ASSISTANT UNITED STATES ATTORNEY: That's correct. (A.55, emphasis supplied.)

When the Magistrate asked counsel for the government to explain the delay, he was told that "government bureaucracy" was to blame (Pet. App. B, 22a).

The court of appeals did not misapply the criteria of this Court when it concluded that this is an unacceptable excuse for delaying the prosecution of Dr. MacDonald. "Government bureaucracy" is another way of saying that the Justice Department was unable to regulate itself and to meet the obligations imposed upon it by the Sixth Amendment to

> . . . move with the dispatch that is appropriate to assure an accused an early and proper disposition of the charges against him. *Marion, supra,* at 313.

If the court of appeals had not rejected the "government bureaucracy" excuse in this case, then every government delay would have to be excused on the ground that it was the best that can be expected from inefficient, indifferent and even negligent prosecution agencies.

Part of the "government bureaucracy" delay was due to the time consumed to allow a succession of attorneys to "become familiar" with the case. The affidavit of Deputy Assistant Attorney General Kevin T. Maroney described the process:

> The case was assigned and reassigned to various staff attorneys, of the General Crimes Section, who repeatedly reviewed and re-reviewed the matter. Numerous conferences were held . . . (A. 27-28).

However, Mr. Maroney never explains what action, if any, the Department of Justice took as a result of this constant review and re-review of the matter. The government itself offered no reason why so many attorneys were used. Nor, when one attorney had studied the case, why he or she did not submit a recommendation as to the disposition to be made of the case. But when the matter was finally turned over to a Justice Department attorney with instructions to proceed with the case, he was able to review all the files and commence the presentation of evidence to the grand jury within one month after being assigned to the matter.

Perhaps, as this Court suggested in *Dickey v. Florida,* 398 U.S. 30, 38 (1970), having too few lawyers may make some delay inevitable. But, a delay resulting from having *too many* lawyers is not inevitable.

The third factor this Court laid down in *Barker* is the defendant's responsibility to assert his right. The court of appeals found that Dr. MacDonald had "consistently expressed a desire to have the case resolved" starting as early as January, 1972 (Pet. App. B, 24a). His attorney wrote letters to the Justice Department offering the government the opportunity to question Dr. MacDonald and asking for a final decision on the matter (Pet. App. B, 2a, n.5; 10a, n.6; 24a).



Far from impeding the prosecution, Dr. MacDonald testified and was cross-examined at his Article 32 hearing; he submitted voluntarily to a C.I.D. interview on February 19, 1971 (A. 557); he waived immunity and testified for six days before the grand jury; and he repeatedly offered to be interrogated by the Department of Justice. He even agreed to a grand jury request to submit to interrogation under sodium amytol. But all of Dr. MacDonald's requests for expedition were ignored by the government.

"Both the facts and the law," the court of appeals held, "warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial" (Pet. App. B, 24a). By any reckoning this factor, too, must weigh heavily on respondent's side of the balance. *Barker, supra.* And, the court of appeals properly applied it in its analysis.

The fourth factor this Court laid down in *Barker* for judging speedy trial claims is one of prejudice to the accused. In discussing this factor, this Court said:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker, supra,* at 532.

Dr. MacDonald has twice been subjected to confinement, for a total of more than six months, as a result of these charges. However, this Court has

specifically held in *Klopfer v. North Carolina,* 386 U.S. 213 (1967) that oppressive pretrial confinement is not required for relief under the speedy trial portion of the Constitution.

But, Dr. MacDonald's ability to present his defense has seriously been impaired by the passage of so many years. The case against Dr. MacDonald is, in the words of the court of appeals, "wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime" (Pet. App. B, 5a-6a). It depends on the recollection of such details as the position of a chair or flowerpot, the manner in which a pajama top was folded. Such matters are difficult enough to remember accurately immediately after the event; five years later it is nearly impossible to rely on the accuracy of the witnesses' recollection of such details. The best that could be hoped for after so much time, is testimony from memories "refreshed" by reference to records and transcripts where they exist.[8]

Even the termination of the military proceedings against Dr. MacDonald and his release from detention on bail, in the words of the court of appeals,

[8]In this regard, the court of appeals noted:

> The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked (Pet. App. B, 26a).

And, this Court declared in *Barker* that "loss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532.



"did not . . . dispel the effects of the government's initial accusations" (Pet. App. B, 17a). The court pointed out that "MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him" (Pet. App. B, 17a). And, as a result Dr. MacDonald also suffered intangible, but nonetheless real, prejudice as outlined by the Court in *Klopfer* and *Barker*. He has had to retain counsel, at enormous expense, for more than six and one-half years. He has lived for those years with "anxiety and concern" of this unresolved prosecution (*Barker, supra,* at 532) and with the public scorn (*Klopfer, supra,* at 222) and obloquy (*Marion, supra,* at 320) attendant upon his having remained for six and one-half years the only suspect in the murders of his wife and children.[9]

It was apparent to the court of appeals that by the criteria set forth in this Court's speedy trial cases, dealing with intangible as well as tangible prejudice to an accused, Dr. MacDonald has suffered prejudice from the unwarranted delay in bringing his case to trial. This factor was properly weighed against the government.

So, in scrutinizing the application of *Barker v. Wingo, supra,* by the court of appeals, it is apparent that the decision in the *MacDonald* case does not raise

[9]If this Court felt it necessary to take into account the public feeling toward Klopfer, who was accused of nothing more serious than having refused to leave a restaurant when asked to do so, surely the public feeling against Dr. MacDonald, accused of having murdered his family, cannot be viewed less seriously.

questions that are so difficult, so significant, and of wide enough general application to require review by this Court on certiorari. It does not require another opinion of this Court to establish that a delay of more than four and one-half years between institution of criminal proceedings and indictment is sufficiently long to justify an inquiry into the rest of the *Barker* criteria. It does not require review by this Court to establish that "government bureaucracy," inefficiency in the Department of Justice, and an unexcused four-year delay in submitting obviously material evidence to the Federal Bureau of Investigation for a second laboratory examination, are not adequate reasons to justify or excuse the delay. And yet, these are the reasons advanced by the government to excuse its conduct. The court of appeals properly weighed these circumstances heavily against the government.

It is not necessary for this Court to pass on the consistent assertion by Dr. MacDonald of his right to a speedy disposition of his case because the government has never seriously contended that he did not do so.

After the opinions of this Court in *Klopfer, Dickey, Marion* and *Barker,* it is not necessary to have yet another decision of this Court in order for there to be recognition that the respondent was prejudiced by the years of delay in this case.

Respondent suggests that the determinations the Solicitor General asks this Court to make in *MacDonald* have already been made in *Barker, supra,* and that the criteria set forth there have been precisely



and correctly applied by the court of appeals. There are certainly cases in which the application by lower courts of the four criteria of *Barker* is not clear, and in which the guidance of this Court is needed to assure the correct application of the speedy trial provision of the Constitution. But they were clear enough here for the court of appeals to be guided in its determination, and that court followed the guidelines correctly.

b. The government suggests that review is needed to resolve a "conflict" with cases from two other circuits, *United States v. Bishton,* 463 F.2d 887 (D.C. Cir. 1972) and *United States v. Flores,* 501 F.2d 1356 (2d Cir. 1974). The suggestion is a make-weight argument without merit. The decisions in these cases do not indicate a conflict with *MacDonald.*

In *Bishton, supra,* the delay complained of was only three months. In *MacDonald,* even when the time for the lengthy C.I.D. "re-investigation" is excluded, the delay complained of is more than two and one-half years.

Further, the delay in *Bishton* resulted from a "highly technical" flaw in the indictment (*Bishton, supra,* at 890-91) and from the choice of the wrong court in the judicial structure of the District of Columbia to which an appeal was taken. There was no allegation that the government did not proceed with creditable speed and at a pace that was at least deliberate. The problem was simply that it had chosen the wrong court for the appeal and a negligible time delay resulted. The court in *Bishton* stated:

> We do not intimate that the delay caused by appeals by the Government may never constitute denial of a defendant's right to speedy trial. Whenever the Government's action at any stage of the proceedings indicates . . . neglect . . ., the resulting delay is not justified. *Bishton, supra,* at 890.

After discussing the reasons for the delay in Bishton's case, the court concluded that:

> The foregoing analysis of the delays in this case reflects no neglect, indifference, or lack of reasonable diligence on the part of the Government. *Bishton, supra,* at 891.

How very different *Bishton* is from *MacDonald,* where the very gravamen of the respondent's complaint and the court of appeals findings are: that the Government let years pass through inefficiency; through passing of files from attorney to attorney until a few months before the expiration of a statute of limitations; through neglect, because of "bureaucracy," to re-analyze existing evidence; and, through unconcern for speedy trial rights despite repeated efforts by the accused to have them respected. The Court in *Bishton* declared that if it had been a case

> . . . where the delays could not be explained or justified by the government . . ., then the balance between the interest of the public and the protection of the individual might be different. *Bishton, supra,* at 891-92.

But, that, of course, is the *MacDonald* case. It is difficult to see the conflicts that the Solicitor General perceives as existing.



The *Flores* case does not even deal with the Sixth Amendment, which is entirely the basis for the decision in *MacDonald.* The speedy trial right allegedly violated in *Flores* arose from Rule 4 of the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases. That plan provided for dismissal with prejudice if the government was not ready for trial within six months of arrest or charge. While allowance was made for certain excusable delays, the local rules did not permit the government more than six months cumulative delays before trial. *Flores* is not a Sixth Amendment case and cites none of this Court's speedy trial decisions. It was decided entirely under local Rule 4 and does not pose any conflict with *MacDonald.*

The government's allegation of conflict among the circuits is frivolous.

c. The government also urges that review is necessary because Dr. MacDonald was released from custody and the charges against him dismissed after his first (Army) prosecution. "A necessary consequence" of the language of *Marion,* the Solicitor General argues:

> . . . is that the right to a speedy trial is not implicated in the period after the charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or surface interference with his liberties; necessarily, there can at that stage be no Sixth Amendment obligation upon the government to bring to trial expedi-

> tiously a person against who *(sic)* no criminal charges are outstanding. Petitioner's Brief for Certiorari at 18.

This argument fails both on the facts and on the law. It fails on the facts because even after the dismissal of the Army charges, Dr. MacDonald remained under active suspicion. He was openly and exhaustively reinvestigated by the C.I.D. Even when he was out of the Army, Dr. MacDonald was reinterrogated by the C.I.D. in a formal, recorded session on February 19, 1971 (A. 557). He was given *Miranda* warnings at that time. The suspicion of him was public and continuous during the period following the dismissal of the Army charges.

Even more seriously, the government's argument fails on the law. There was no significant difference between Klopfer, released from custody because the charge against him was *nolle prossed* but subject to reprosecution by North Carolina, and MacDonald, released from custody, the charge against him dismissed, but still subject to prosecution by the United States. As the court of appeals said, Dr. MacDonald's case "bears a marked resemblance" to Klopfer's (Pet. App. B, 18a). After formal arrest and charge, Klopfer and MacDonald both contested their accusations with apparently inconclusive results. The prosecution authorities in both cases believed they had a right to go forward promptly, but neither proceeded to a trial. Both defendants were deprived of any forum in which to vindicate themselves, and both had to await the government's pleasure, which was far from prompt.



And, in both cases it was held that the defendant's Sixth Amendment rights to a speedy trial were not extinguished by the first dismissal of the charges against him, if a second prosecution was not barred. As the court of appeals recognized, the contention of the government cannot survive a reading of this Court's opinion in *Klopfer*.

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### 2. THE INTERLOCUTORY APPEALS ISSUE

The petition in this case should be denied because the government's claim, that the issue of interlocutory appeals in criminal cases is such a "vexing" matter (Petitioner's Brief for Certiorari at 15) that it requires present review by this Court, is an illusory one.

First, in the more than twenty-seven years since the rule in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), was announced, the courts of appeals have applied the rule rigorously to prevent defendants from obtaining unwarranted pretrial delays by the filing of unmeritorious interlocutory appeals.

This Court has before it memoranda from the Solicitor General in three cases,[10] in addition to the present one, in which the government has raised the issue of interlocutory appeals. In not one of these memoranda has the government pointed to a single fact to sustain

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[10] *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976), *petition for cert. filed*, 44 U.S.L.W. 3749 (U.S. June 21, 1976) (No. 75-1844); *Barket v. United States*, 530 F.2d 181 (8th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3584 (U.S. Mar. 9, 1976) (No. 75-1280); *Abney v. United States*, 530 F.2d 963 (3d Cir.), *cert. granted*, 96 S. Ct. 2646 (1976).

its contention that interlocutory appeals in criminal cases have raised a problem of significant proportion. The government points to no data to indicate that such appeals have created any measurable burden to the costs of appeals or delay in district courts.[11] It has failed to do so because the facts or data would not sustain the government's suggestions.

Second, the government's characterization of the present case as an appropriate one for review because it arises "in a context not complicated by the special circumstances that may obtain in cases involving double jeopardy claims" (Petitioner's Brief for Certiorari at 15) patently ignores the facts. This case presents more complications than any of the other so-called interlocutory appeal cases before this Court.

The case was originally before the court of appeals because of Dr. MacDonald's double jeopardy/collateral estoppel claim. That claim, based upon a 1970 military proceeding which concluded with a formal finding that the murder charges were "not true," was found to be "not frivolous" (Pet. App. C, 42a). The court of appeals withheld ruling on the claim, however, because of concern for its possible impact on the military justice system (Pet. App. B, 28a). Because of judicial restraint, the court limited its ruling to the speedy trial claim of respondent. But it is clear that the court of appeals perceived the double jeopardy and speedy trial claims of Dr. MacDonald to be of equal importance and merit from the outset (Pet. App. C, 42a).

[11] In fact, the contrary is true. *See* pp. 35-36 *infra*.



The present case, by every standard, presents one set of unique facts after another. The Solicitor General has had occasion previously to acknowledge this to this Court.[12] The respondent's counter-statement of facts details some of the extraordinary background of this case.

Third, the courts of appeal and district courts are well equipped to deal with frivolous interlocutory criminal appeals. The courts of appeal have dealt swiftly with such appeals by granting government motions to quash erroneously brought cases. Where they have undertaken to hear pretrial appeals on a double jeopardy claim, they have on occasion also considered the so-called pendent issues for the purposes of swiftly disposing of them to prevent further delay by the defendant. (See *Abney v. United States*, note 10 *supra*.)

And, district courts have not found themselves prevented from proceeding to trial just because a criminal defendant has filed a frivolous interlocutory appeal. Such appeals have been held, in a number of cases, not to divest the district court of its jurisdiction to proceed with the case.[13]

[12] Respondent petitioned this Court for review of the denial of his efforts to obtain a change of venue. *MacDonald v. United States, cert. denied*, 423 U.S. 926, 927 (1975). The opposition memorandum of the Solicitor General observed, "Petitioner's contentions turn upon the *rather unusual facts* of his case, and he presents no questions of general importance requiring review by this Court." Memorandum in Opposition, at 4. (Emphasis supplied.)

[13] *Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972); *McCann v. Kerner*, 436 F.2d 1343 (7th Cir. 1971); *Babcock & Wilcox Co. v. Foster Wheeler Corp.*, 54 F.R.D. 474 (D.N.J. 1971).

In urging this Court to review the action of the court of appeals in deciding the *MacDonald* case on an interlocutory appeal, the government relies heavily on its earlier memoranda submitted to this Court in *Abney v. United States,* note 10 *supra* and *United States v. Barket,* note 10 *supra.* The argument found in each of these petitions does not properly address itself to the propriety of the action of the court below in entertaining an interlocutory appeal in a case as unique as *MacDonald.*

a. In *Abney* the government simply asserted that both of petitioner's claims (double jeopardy and the failure of a bill of indictment to charge an offense) were "insubstantial" *(Abney,* Memorandum at 4, n.2). And, the government argues, if defendants are encouraged to believe that they can obtain pretrial appellate review of complex and close claims of any sort by tying them to insubstantial double jeopardy claims, the effect would be to encourage significant pretrial delay in criminal cases.[11]

When this argument is examined either in terms of the totality of federal criminal cases, or the *MacDonald* case in particular, the insubstantiality of this contention is apparent.

The government's contention requires an inquiry into the question of which federal criminal defendants

[11]The argument asserted by the government in speaking of *Abney* (*Barket,* Memorandum at 7, n.9), that "potential for delay caused by joining a colorable statutory claim to a frivolous double jeopardy claim is immense," should not be used by this Court by way of analogy for, again, such are not the facts of the present case.



are in a factual position to raise even the most specious double jeopardy claim.

Among the total number of federal criminal cases, only a very small percentage represents re-trials, either as a result of a new trial having been granted or because of a mistrial. And, review of the *MacDonald* case by this Court in no way answers the question of whether claims of double jeopardy, made under such circumstances, are substantial or not.

In the particular terms of the *MacDonald* case, the court of appeals had more than adequate grounds for recognizing the uniqueness of its facts. A case in which the United States has once charged an accused with murder, gone through a full military judicial proceeding which resulted in a finding that the charges were "not true," and then four and one-half years later attempted to prosecute the accused again in a civilian proceeding on these charges, is not likely to occur again. And, its occurrence, and consequent double jeopardy challenge, including interlocutory appeal, presents no real threat to the orderly disposition of the great mass of criminal cases.

In *Abney,* the appellate court entertained an interlocutory appeal of a claimed insufficiency in an indictment because it held the claim to be "pendent" to a double jeopardy claim. This is to be contrasted to the situation in the present case. While the court of appeals held that the respondent's speedy trial claim was pendent to his double jeopardy claim (Pet. App. B, 5a), both were adjudged independent claims of constitutional dimensions. The court of appeals, it

should be noted, had made an initial finding that this claim was not a frivolous one (Pet. App. C, 42a; see also Pet. App. B, 6a). No such finding was made in *Abney,* and none was possible under the facts. Thus, the government arguments articulated in *Abney* are misapplied to respondent's case.

b. The government also relies heavily on the arguments made by it in its memorandum in *Barket* as providing support for its request for certiorari in the *MacDonald* case. In *Barket,* the government memorandum acknowledges that the settled principle embodied in 28 U.S.C. §1291 is that an appeal *ordinarily* must await final judgment. *(Barket,* Memorandum at 6, emphasis supplied.) However, nowhere in its subsequent argument does the government acknowledge that any significance is to be attached to the corollary of this rule: that unusual circumstances require the remedy of an interlocutory appeal.[15]

The government also argues, in its *Barket* memorandum, that this Court's decision in *DiBella v. United States,* 369 U.S. 121 (1962), in effect is virtually an absolute bar to any pretrial appeal in criminal cases. Such an interpretation is erroneous.

[15]The government suggestion of the use of a writ of mandamus for review of erroneously rejected double jeopardy claims is ineffectual (*Barket,* Memorandum at 11). The rigidity of the rules pertaining to mandamus, even to obtain review of valid double jeopardy claims, is too great to be workable. 9 Moore's Federal Practice ¶ 110.01 (1975). When this Court decided *Cohen v. Beneficial Industrial Loan Corp., supra,* it was fully cognizant that mandamus was available as a potential remedy for issues that litigants sought to have reviewed on pretrial appeal. The Court, nevertheless, recognized the inadequacy of this writ and provided for an exception for limited numbers of pretrial appeals.



In *DiBella* the defendant sought to appeal pretrial the denial of his motion to suppress evidence. In rejecting his right to a pretrial appeal, this Court stressed that the constitutional guarantee of a speedy trial, when balanced against the right to an interlocutory appeal on this particular issue, was of a greater significance and required that such appeals not be allowed prior to verdict.

Further, there was present in *DiBella* the serious practical consideration of the effect of pretrial appeals from the denial of motions to suppress. Such motions are active possibilities in the overwhelming number of criminal cases. To allow pretrial appeals in such volume posed potential problems of delay in the trial of a great number of criminal cases. *DiBella* foreclosed such a possibility.

The opinion of the Court in *DiBella* emphasized that historical principles give highest priority to the trial of criminal cases without delay. The decision sought to put the finality rule into proper perspective as it relates to criminal cases. But, it also clearly acknowledged the need to maintain flexibility in the administration of the rule. As Mr. Justice Frankfurter stated in *DiBella:*

> Since the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions. Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the *damage of error unreviewed before the judgment is definitive and complete,* see *Collins v. Miller,* 252 U.S. 364, 370, *has been deemed greater*

*than the disruption caused by intermediate appeal.* 369 U.S. at 124 (Emphasis supplied).

The inflexible interpretation of *DiBella* urged by the government would bar absolutely all interlocutory appeals in criminal cases. It asks this Court to reject the modest flexibility described as necessary by Justice Frankfurter.

The government's argument also asks this Court to read *DiBella* as if it impliedly overruled the declaraton of this Court in *Cohen v. Beneficial Industrial Loan Corp., supra,* that there is a distinct and limited number of criminal cases in which in interlocutory appeals can be taken.[16]

The criteria set down by this Court in *Cohen* were specific and clear. The exception applies only to that "small class of claims of right which required appellate review before trial.[17] These rights were described by Mr. Justice Jackson as

> . . . separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent to be deferred until the whole case is adjudicated. The Court has long

[16]The suggestion in the government's memorandum in *Barket* (Memorandum at 9) that perhaps *Cohen* does not even apply to criminal cases is unsupported by the opinions of any lower courts. And, the government comes rather late to this suggestion in view of the twenty-seven-year history of this rule, which has been applied sparingly and with no significant interference with the movement to trial of criminal cases.

[17]Congress enacted 28 U.S.C. §1291 as part of its exercise of regulatory power over the appellate jurisdiction of federal courts. In the intervening years since the *Cohen* doctrine was announced it is significant to note that Congress has not found that the practical administration of this exception has created conditions requiring it to foreclose this limited right to interlocutory appeals in criminal cases.



> given this provision of the statute this practical rather than a technical construction. *Cohen v. Beneficial Industrial Loan Corp., supra,* at 547.

The government's contention that "once pretrial appellate review of double jeopardy claims is accepted, some courts may be quick to extend the practice beyond cases involving only that particular constitutional provision," is unsupported by the history of this exception. Rather, a fair reading of the cases can lead only to the conclusion that the appellate courts have severely restricted the use of the *Cohen* exception.[18]

This Court itself has reaffirmed that the emphasis in the application of this exception should be on a "practical rather than technical construction" to be given to the term "final judgment" found in the appeals statute.[19] It is clear that the Court has stressed to the lower courts the efficacy and justice of a pragmatic rather than a dogmatic approach in determining what is "final." The courts have acted within these limits and with restraint.

c. The court of appeals allowed Dr. MacDonald to pursue an interlocutory appeal on speedy trial

[18]*Gavino v. MacMahon,* 499 F.2d 1191 (2d Cir. 1974); *United States v. Beckerman,* 516 F.2d 905 (2d Cir. 1975); *Higgins v. United States,* 205 F.2d 650 (9th Cir. 1959); *Roberts v. United States District Court,* 339 U.S. 844 (1950); *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972); *United States v. King,* 482 F.2d 768 (D.C. Cir. 1973); *McSurley v. McClellan,* 426 F.2d 664 (D.C. Cir. 1970); *United States v. DiSilvio,* 520 F.2d 247 (3rd Cir.), *cert. denied,* 96 S. Ct. 447 (1975); *United States v. Barket, supra,* note 7.

[19]*Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555 (1962); *Brady v. Maryland,* 373 U.S. 83 (1963); *Hudson Distrib. Inc. v. Eli Lilly & Co.,* 377 U.S. 386 (1964); *Mills v. Alabama,* 384 U.S. 214 (1966).

grounds only after it had first determined that the claim was inextricably tied to his double jeopardy claim. It did not decide that a speedy trial claim alone or one linked with a double jeopardy contention automatically requires the allowance of an interlocutory appeal. Rather, the court made clear that it was only undertaking to decide the speedy trial issue because of the following special circumstances:

1. A decision on the double jeopardy issue involved deciding a matter that would have a general impact on military law. Rather than decide the case on broad grounds the court acted only on the narrower speedy trial claim. The court explicitly noted that it was motivated to do so because of a genuine sense of judicial restraint. (Pet. App. B, 5a.)

2. The court was persuaded to hear and decide the speedy trial claim because of the "extraordinary nature of MacDonald's case." *Id.* And, the court had only decided to do so after having made an initial determination, at the time that the appeal was filed, that the claim was meritorious. (Pet. App. C, 42a.)

The court of appeals carefully noted that it did not intend to allow the claim of denial of speedy trial to serve as an opportunity for defendants generally to take interlocutory appeals. Rather, the court noted:

> Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after judgment. (Pet. App. B, 5a.)

3. It was clear from the extensive record in the case that the court had before it all the facts on the



speedy trial issue that would have been presented to it if the appeal had been taken post-trial. (Pet. App. B.)[20]

Having taken the *MacDonald* case because it raised a serious and well-founded double jeopardy claim which was intertwined with a well-founded speedy trial claim and being impressed with the constitutional magnitude of the latter claim, the court acted appropriately in granting relief on that ground. The unique legal and factual context in which the issue arose justified the decision of the court of appeals to decide the speedy trial issue pretrial.

d. The extent to which the government has presented an illusory issue of interlocutory appeals to this Court, in its effort to actually obtain review on the merits of the speedy trial decision, is demonstrated by some data.

An inquiry made to the Division of Information Systems of the Administrative Office of the United States Courts revealed that the office no longer publishes figures on the number of interlocutory appeals taken to the courts of appeals. Such data were collected and published until 1970. Publication was discontinued thereafter, however, because of the small number of cases involved.

The figures for the year 1970, however, are of interest. In that year, a total of 291 applications were

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[20]Thus, the government's reading of *Barker, supra,* at 530-32 (1972), that an appellate review of a speedy trial claim is most effectively accomplished after a complete presentation of the facts has been already effectuated here. (Petitioner's Brief for Certiorari at 16.)

made for interlocutory appeals in *all* courts of appeals. The figure does not indicate, and data are apparently not available to show, what proportion of these cases were criminal matters.

e. Finally, it should be noted that even looking at the narrowest possible effect of a review by this Court of the speedy trial decision of the court of appeals, *i.e.,* its impact on *MacDonald* alone, such a review may well be of doubtful significance. In addition to his claim of denial of speedy trial, respondent has also a claim of double jeopardy which the court of appeals held was "not fanciful" (Pet. App. B, 6a). The court of appeals stated:

> In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded . . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . . . (Pet. App. B, 4a, n.3).

When it entered its judgment on the appeal later, the court stated, on the double jeopardy issue, that:

> In view of . . . our disposition of the case under the speedy trial provision of the Sixth Amendment, we find it unnecessary and imprudent to render an opinion (Pet. App. B, 28a).

If this Court should grant certiorari, beyond that, if this Court should thereafter reverse the decision,



the case will not be able to proceed to trial. Instead, the district court will have to reconsider the respondent's motion to dismiss because of double jeopardy/collateral estoppel in light of the expressed views of the court of appeals.

Because of all of these circumstances, the respondent's case is an inappropriate candidate for review by this Court on certiorari of the merits of the speedy trial determination of the court of appeals.

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## CONCLUSION

For all of the foregoing reasons, the respondent, Dr. Jeffrey R. MacDonald, respectfully submits that the Petition for a Writ of Certiorari should be denied.

August, 1976.

Respectfully submitted,

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